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No. 84-1712

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
Acting General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

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We submit this brief reply to respondent's erroneous assertion (Br. in Opp. 4 (emphasis in orginal)), that "[t]he principal [*sic*] remains clear that as to *substantive* challenges to a rule, the time limit under the Hobbs Act does not apply."

Respondent relies principally (as did the court of appeals) on decisions of the United States Court of Appeals for the District of Columbia Circuit to support the proposed distinction between procedural and substantive challenges to agency rulemaking. A recent decision of the District of Columbia Circuit, however, fully refutes that claim. In *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985), the court held that the expiration of a statutory time period for seeking review of EPA regulations, analogous to the Hobbs Act's 60-day limitation, creates a jurisdictional bar to parties seeking to challenge the substantive

validity of the rules. As in the instant case, the parties in *Eagle-Picher* had not sought direct review of the regulations, but waited to launch their attack until they were parties to a proceeding in which the regulations were applied.[1] See 759 F.2d at 911-915. *Eagle-Picher*, therefore, directly contradicts the Fifth Circuit's jurisdictional holding in this case.

Moreover, *Eagle-Picher* puts into proper context the two cases—*Natural Resources Defense Council* v. *NRC*, 666 F.2d 595 (D.C. Cir. 1981), and *Geller* v. *FCC*, 610 F.2d 973 (D.C. Cir. 1979)—that respondent contends (Br. in Opp. 4 (emphasis omitted)) "expressly acknowledge" a substance/procedure dichotomy. As the court explained in *Eagle-Picher*, the *Geller* case involved a challenge that did not ripen until long after the statutory review period had expired. 759 F.2d at 912. The court emphasized, however, that it had "dismissed all of Geller's claims for lack of timeliness, except one which had clearly just become ripe with the passage of new legislation." *Id.* at 913 (footnote omitted).[2] The *Eagle-Picher* opinion also relied on *Natural Resources Defense Council* in holding that statutory time

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[1] *Eagle-Picher* involved regulations promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* Section 113(a) of that Act requires challenges to EPA regulations to be made by filing a petition for review within 90 days from the date the rules are promulgated. 42 U.S.C. 9613(a).

[2] In *Geller* the petitioner challenged a 1972 FCC rulemaking order and a subsequent 1976 decision in which the Commission refused to alter the rules. The court noted that Geller's procedural *and substantive* challenges to the agency's 1972 decision were "grossly untimely" and, because the Hobbs Act's 60-day time limit had expired, "we lack jurisdiction to consider so much of Geller's presentation." 610 F.2d at 977 (footnote omitted). The court was therefore restricted to entertaining Geller's challenge "not of the 1972 order promulgating the contested rules, but of the 1976 order refusing to reexamine their continuing validity [in light of recent legislation]." *Id.* at 978 (footnote omitted).

limits are jurisdictional and designed "to protect agencies from endless judicial interference with formalized administrative policy." 759 F.2d at 911 nn. 28 & 29, 913 & n.40 (footnote omitted). Thus, *Eagle-Picher* strips away much of the foundation upon which the lower court's reasoning and respondent's assertions are based. It also underscores the conflict that exists in the courts of appeals on the question presented in this case.[3] The Hobbs Act's jurisdictional limitations are presently a source of considerable confusion[4] and litigation and will continue to be such absent this Court's review.

For the foregoing reasons, and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court may wish to consolidate this case with *ICC* v. *Tri-State*, No. 84-1515, or to hear the cases in tandem.

CHARLES FRIED
Acting Solicitor General

ROBERT S. BURK
Acting General Counsel
Interstate Commerce Commission

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[3]Although *Eagle-Picher* is not itself a Hobbs Act case (see note 1, *supra*), much of the precedent upon which it relies arose under that legislation. And, the principle of finality that prompted the Hobbs Act's 60-day review period is similarly expressed in comparable review limitations contained in other statutes.

[4]Even in the District of Columbia Circuit, *Eagle-Picher* is not the latest pronouncement. Subsequent decisions by other panels suggest that *Eagle-Picher*'s jurisdictional holding is not consistently applied (see *Brotherhood of Locomotive Engineers* v. *ICC*, No. 83-2290 (D.C. Cir. May 3, 1985), slip op. 6-7 (MacKinnon, J., dissenting)), and that the issue is still viewed as unsettled (see *Aluminum Co. of America* v. *ICC*, No. 83-1730 (D.C. Cir. May 10, 1985), slip op. 11).